COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2015-SC-000555

ON APPEAL FROM COURT OF APPEALS CASE NO. 2013-CA-0001677-MR
HOPKINS CIRUCIT COURT, HON. JAMES C. BRANTLEY
CIVIL ACTION NO. 11-CI-00387

KATHY McABEE — **APPELLANT**

v.

DARREN C. CHAPMAN, M.D. — **APPELLEE**

BRIEF FOR APPELLANT

CHARLES S. WIBLE LAW OFFICES, P.S.C.

By: _____
Charles S. Wible
324 St. Ann Street
Owensboro, KY 42302
Tele: (270) 926-3377
Fax: (270) 683-0408
Email: wiblelawoffices@bellsouth.net

ATTORNEY FOR APPELLANT

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 2015, true and correct copies of the foregoing BRIEF FOR APPELLANT were served via U.S. Mail, Postage Prepaid, upon the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. James C. Brantley, Judge, Hopkins Circuit Court, Justice Center, 120 E. Center Street, Box 1, Madisonville, KY 42431; and Charles G. Franklin, Esq. FRANKLIN, GORDON, & HOBGOOD, 24 Court Street, P.O. Box 547, Madisonville, KY 42431. I FURTHER CERTIFY that the Record of Appeal was not checked out from the Clerk of the Kentucky Supreme Court prior to the filing of this brief.

By: _____
Charles S. Wible

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2015-SC-000555

ON APPEAL FROM COURT OF APPEALS CASE NO. 2013-CA-0001677-MR
HOPKINS CIRUCIT COURT, HON. JAMES C. BRANTLEY
CIVIL ACTION NO. 11-CI-00387

KATHY McABEE **APPELLANT**

v.

DARREN C. CHAPMAN, M.D. **APPELLEE**

BRIEF FOR APPELLANT

CHARLES S. WIBLE LAW OFFICES, P.S.C.

By: _____
Charles S. Wible
324 St. Ann Street
Owensboro, KY 42302
Tele: (270) 926-3377
Fax: (270) 683-0408
Email: wiblelawoffices@bellsouth.net

ATTORNEY FOR APPELLANT

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this ____ day of September, 2015, true and correct copies of the foregoing BRIEF FOR APPELLANT were served via U.S. Mail, Postage Prepaid, upon the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. James C. Brantley, Judge, Hopkins Circuit Court, Justice Center, 120 E. Center Street, Box 1, Madisonville, KY 42431; and Charles G. Franklin, Esq. FRANKLIN, GORDON, & HOBGOOD, 24 Court Street, P.O. Box 547, Madisonville, KY 42431. I FURTHER CERTIFY that the Record of Appeal was not checked out from the Clerk of the Kentucky Supreme Court prior to the filing of this brief.

By: _____
Charles S. Wible

INTRODUCTION

This is a medical malpractice case where the Defendant requested an exemption of sequestration of his experts under Kentucky Rule of Evidence 615(3) which was granted by the Circuit Court and that decision upheld by the Court of Appeals. This Court's recent opinion in Spears v. Commonwealth, 448 S.W. 3d 781 (Ky. 2014) rejects the KRE 615(3) analysis of both the Circuit Court and the Court of Appeals, requiring the Court of Appeals to be reversed, the judgment of the Circuit Court vacated, and the case remanded for a new trial.

STATEMENT CONCERNING ORAL ARGUMENT

As this Court's analysis in Spears v. Commonwealth is directly on point with the issues presented in this appeal, Appellant Kathy McAbee believes that oral argument is unnecessary.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellant, Kathy McAbee, filed a malpractice action against Darren Chapman, M.D. in 2011 claiming injury due to medical negligence during a surgical procedure. The case proceeded to a four day jury trial in August 2013. During the morning of the second day of trial, Appellant invoked what is colloquially known as "the rule" regarding separation of witnesses[1]. (VR 8/21/13; 10:05:05, App. C at 1). While on the record discussing the motion, Appellant requested that separation apply to both expert and lay witnesses. Id. Appellee responded stating that he believed that the rule of separation applied only to lay witnesses. Id. The Circuit Court reserved its ruling until the lunch break, giving the Circuit Court an opportunity to examine the applicable law. Id.

During the lunch break, the Circuit Court referenced KRE[2] 615(3) as the applicable rule, and asked Appellee for an explanation why it is essential that Appellee's experts be exempted from sequestration. (VR 8/21/13; 12:49:48, App. C at 2). Appellee's full response was "[yes] sir, these experts will not be testifying as to the facts of the case, and they are essential to the management of the case." Id. After hearing argument from the Appellant, the Circuit Court granted an exemption to sequestration for Appellee's experts, adding as additional reasons that the expert witnesses would be testifying as to different opinions and that "[it] would be helpful to the fact finder for [the expert witnesses] to be able to comment on the testimony of the expert witnesses from the other side." Id., App C at 2-3 During Appellee's case in chief, Appellee repeatedly asked his expert, Dr. Shuttleworth, if he had listened to the testimony of the other witnesses in the case, and to comment on the testimony of Appellant's expert, Dr. Kodner on direct examination. (VR 8/23/13: 9:19:47, App C. at 3) (VR 8/23/13; 9:36:18, App C. at 3-4)

---

[1] For the convenience of this Court, the relevant portions of the video record have been transcribed and are attached at App. C.

[2] Kentucky Rule of Evidence

(VR 8/23/13; 9:55:20, App. C. at 4-5) (VR 8/23/13; 10:00:40, App. C. at 5-6) (VR 8/23/13; 10:05:50, App. C at 6-7) (VR 8/23/13; 10:08:51, App. C at 8) (VR 8/23/13; 10:12:11, App. C. at 8-11) (VR 8/23/13; 10:22:13, App. C at 11-12) (VR 8/23/13; 10 49:04, App. C. at 12-15) (VR 8/23/13; 11:00:24, App. C at 15-18) (VR 8/23/13; 11:07:33, App. C at 19). A judgment was entered after nine of twelve jurors found in favor of Appellee. (App. B at 3).

Following the entry of the Circuit Court judgment, Appellant filed a timely appeal to the Kentucky Court of Appeals, which affirmed the judgment of the Circuit Court. (App. A at 5). The Court of Appeals noted that this Court had not at that time spoken on the applicability of KRE 615(3) as to expert witnesses. (App. A at 3). Citing this Court's opinion in Hatfield v. Commonwealth, 250 S.W. 3d 590 (Ky.2008) and two Sixth Circuit cases, the Court of Appeals reasoned that the Circuit Court correctly decided that the Appellee had made a showing that exemption from sequestration of his experts was essential to his case. App. A at 3-5. The Court of Appeals determined that the facts of the case were presented to the experts via medical records and that due to the technical nature of the evidence, counsel would require the assistance of experts for cross-examination of opposing experts. App. A at 4-5. From this, the Court of Appeals ruled that an exemption from sequestration was proper as the experts would not influence each other, and "allowing the experts to listen to each other firsthand would be both expedient and helpful to the jury." This Discretionary Review followed.

ARGUMENT

The issues in this case were preserved when Appellant requested that the Court sequester all witnesses, be they are expert or lay witnesses, (VR 8/21/13; 10:05:05, App C at 1), and the Circuit Court ruled on that issue (VR 8/21/13; 12:49:48, App. C at 2-3). Appellant timely appealed the judgment of the Circuit Court which ruled on these issues.

Expert testimony is routine in litigation today. In fact, medical malpractice cases, like this one, cannot proceed without expert testimony. See e.g. Jarboe v. Harting, 397 S.W. 2d 775, 778 (Ky. 1965)(("[T]he general rule is that expert testimony is required in a malpractice case to show that the defendant failed to conform to the required standard, which is, such reasonable and ordinary knowledge, skill and diligence as physicians in similar neighborhoods and surroundings ordinarily use under like circumstances."). While the Court of Appeals noted when it rendered its decision that this Court had not addressed the applicability of sequestration to expert witnesses, App. A at 3, this Court recently decided this very issue in Spears v. Com., 448 S.W. 3d 781 (Ky. 2014).

Spears had not been decided when this case was tried, nor when this case was before the Court of Appeals. Spears in fact, bypassed the Court of Appeals entirely.[3] However, Spears directly refutes the analysis used by the Circuit Court and the Court of Appeals, Spears demonstrates that the purported "showing" by Appellee required under KRE 615(3) was wholly insufficient, and the mischief Spears sought to avoid is precisely the mischief that occurred in this case.

I. THE COURT OF APPEALS AND THE CIRCUIT COURT MISAPPLIED KRE 615(3), ALLOWING APPELLE'S EXPERT TO REMAIN IN THE COURTROOM FOR AN IMPROPER PURPOSE.

KRE 615 provides as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize the exclusion of:
> (1) A party who is a natural person;

[3] The Defendant in Spears was sentenced to life in prison without the possibility of parole after having been convicted of two murders. 448 S.W. 3d at 784. Because of the sentence, Spears would be directly appealable to this Court. Ky. Const. § 110(2)(b).

> (2) An officer or other employee of a party which is not a natural person designated as its representative by its attorney; or
> (3) A person whose presence is shown to be essential to the presentation of the party's cause.

Once a party has invoked KRE 615, the trial court has no discretion to exempt a witness from sequestration unless one of the exceptions applies. Mills v. Com. 95 S.W. 3d 838, 841 (Ky. 2003). While the trial court has discretion to determine if a witness satisfies the exception under KRE 615(3), a showing by the proponent seeking the exemption is first required before that exception can be satisfied. Hatfield v. Com. 250 S.W. 3d 590, 594. (Ky. 2008). Abuse of discretion is found where "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Com. v. English, 993 S.W. 2d 941, 945 (Ky. 1999).

A. The Plain Language of KRE 615(3) Does Not Permit an Automatic Exemption for Expert Witnesses

While not stating so directly, the Court of Appeals appears to believe that experts are always exempted from sequester. When the Court of Appeals rendered its decision, it noted that this Court had not yet spoken in detail of the application of KRE 615(3). (App. A at 3) Looking to federal authority as a guide, the Court of Appeals first drew upon United States v. Phibbs, 999, F.2d. 1054, 1073 (6th Cir. 1993). (App. A at 3) Phibbs was used as a vehicle to quote the Advisory Committee;

> The Sixth Circuit has explained that "[t]he essential witness exception set out in Rule 615(3) 'contemplates that such persons as an agent who handled the transaction or an **expert *needed to advise in the management of the litigation.'"*** (quoting the Advisory Committee Notes to [FRE] 615)

(App A. at 3)

The Court of Appeals also cited U.S. v. Martin, 920 F. 2d 393, 397 (6th Cir. 1990) apparently to support the proposition that simply because counsel might need to consult experts

because of the technical nature of the evidence, experts must be exempt from sequestration. (App. A at 4) Furthermore, the Court of Appeals found it significant that none of the experts would be testifying only as to opinions, not facts, which in its opinion, would defeat the need for sequestration. (App. A at 4).

The analysis summarized above was flatly rejected by this Court recently in Spears v. Com. In Spears, defense counsel requested permission for a defense expert to sit at counsel table to assist with understanding the Commonwealth's expert and to assist with cross-examination. 448 S.W. 3d at 788. The trial court refused. Id. Defense counsel in Spears invited this Court to apply KRE 615 only to fact witnesses to prevent them from tailoring their testimony and instead to allow (or even encourage) expert witnesses to hear other witnesses and to comment on that testimony, especially the testimony of opposing experts. Id. at 789.

Kentucky Rules of Evidence are interpreted by their plain language; the plain language of the rule cannot be ignored. Lanham v. Com., 171 S.W. 3d 14, 20-21 (Ky. 2005). While Commentary to the Rules of Evidence can assist in interpreting the Rules, Commentary is neither binding nor trumps the plain language of the Rules. Id.

This Court in Spears, without the need to consult any federal case law or commentary, found the plain language sufficient to interpret KRE 615(3) in rejecting defense counsel's invitation to exempt experts wholesale from sequestration. This Court flatly reminded defense counsel that such a wholesale exemption "was not the rule that was in effect when [the] case was tried," 448 S.W. 3d at 789. Instead, a demonstration of some "*specific* contribution" or some showing that the expert's presence was needed to refute the opposing expert was necessary to satisfy KRE 615(3). Id.

Not only should the Court of Appeals have applied the plain language of KRE 615(3) as this Court did in Spears, the Court of Appeals, when searching out federal authority, completely ignored Morvant v. Construction Aggregates Corp., 570 F. 2d 626 (6th Cir. 1978) a Sixth Circuit case directly applying FRE 615 to experts. In Morvant, the Sixth Circuit refused to grant an automatic exemption for experts under FRE 615(c) reasoning "had the framers intended [an automatic exemption], they would have said so, or added a fourth exception." Id. at 630.

In addition, the Court of Appeals and the Circuit Court curiously focus on language other than the word "essential" to explain why Appellee's experts should be exempt from sequestration. The Circuit Court never once used the word "essential" in its ruling, instead emphasizing it would be "helpful" for the experts to hear each other. [VR 8/21/13 12:49:48, App. C at 2)] The Court of Appeals focused its discussion on how it would be "helpful" and "expedient" for the experts to listen to each other rather than how it was "essential" for the experts to be present, and thus agreed with the Circuit Court that Appellee's expert should remain. (App. A at 4-5).

Spears makes clear that plain language of the rule applies. 448 S.W. 3d at 788-789. This Court noted "the advantages, or at least the potential advantages, of having one's own expert present to hear the testimony of the opposing party's experts are self-evident, it is not immediately apparent that the expert's presence is 'essential' to the cause." Id. at 788. The Circuit Court and the Court of Appeals thus dilute language of KRE 615(3) when they justify an exemption for Appellee's expert as it would be "helpful" or expedient."

This Court's analysis is in line with the reasoning of Opus 3 Ltd. v Heritage Park, Inc., 91 F. 3d 625 (4th Cir. 1996) and United States v. Olofson, 563 F. 3d 652 (7th Cir. 2009). In Opus 3

Ltd., the Fourth Circuit found that the proffered witness[4] had access to all of the records of the opposing party, including the records of the costs of services rendered by the expert as well as a written analysis. 91 F.3d at 629. The court determined it was not shown that the witness's presence was "essential" instead of "desirable." Id.

Likewise, in Olofson, the defendant wished his expert present while the government's expert testified to "'rebut or add information' if such testimony was incomplete or incorrect." 563 F. 3dat 661. The Seventh Circuit decided this was not enough to make the expert's presence "essential." Id. The Seventh Circuit noted that "much of the data and malfunction information relied upon by the government's expert was already known to [the defendant's expert]" and that it "might have been helpful or desirable" for his expert to hear the testimony of the government's expert, it was not "*essential* to the presentation of his case." Id. (emphasis original).

The Circuit Court and Court of Appeals seemed to premise their analysis on this issue on the wrong question; given that the expert witness is not testifying to facts, the expert witness has the facts, and it may be helpful or expedient for the jury to have the expert hear the testimony of the other experts, why should the expert witness be sequestered? Applying the plain language of KRE 615(3), Spears, Morvant, Opus 3 Ltd., and Olofoson, the correct question is, if the expert witness is not testifying to facts and already has access to the facts, why is it *essential* that the expert witness *not* be sequestered? By asking the former question, the Circuit Court misapplied KRE 615(3), presuming an exemption to sequestration for expert witnesses abused its discretion, allowing Appellee's expert to remain in the Courtroom. The Court of Appeals likewise misapplied KRE 615(3). Therefore, the Court of Appeals should be reversed, the Circuit Court judgment should be reversed, and this case remanded for a new trial.

---

[4] The proffered witness in Opus 3 Ltd. was presented as both a fact witness and an expert witness. 91 F. 3d at 627. The Fourth Circuit assumed for the purposes of the cited discussion above that the witness was testifying solely as an expert. 91 F. 3d at 629.

B. Allowing an Expert to Observe and Comment on the Testimony of Opposing Experts is Improper Under KRE 615(3)

In Spears, this Court made clear trials should not be conducted "by having expert witnesses indirectly debate one another, point and counterpoint, as they go through direct examination, cross-examination, and redirect examination." 448 S.W 3d at 789. Not only is this contrary to the plain language of KRE 615(3), this Court viewed the indirect debate as no improvement to the normal trial. Instead, this Court made clear that it "favored the time-honored tradition of each expert setting forth his or her opinion, subject to cross-examination by opposing counsel, and letting the jury determine the more credible view." Id.

Sanctioned by the Circuit Court, the indirect debate of which this Court disapproves is precisely the way this trial was conducted. In its explanation denying sequestration of experts, the Circuit Court felt that it would be helpful for the jury if the experts can listen to the other experts, and moreover, the Circuit Court felt "it would be helpful to the fact finder for the [expert witnesses] *to be able to comment on the testimony of the expert witnesses from the other side.*" (VR 8/21/13; 12:49:48, App C. at 2-3)(emphasis original).

With the Circuit Court's approval, Appellee repeatedly referenced Appellant's expert while on direct examination with his own expert. For example, Appellee asked his expert, Dr. Shuttleworth, if he agreed with the in-court opinion offered by the Appellant's expert Dr. Kodner. (VR 8/23/13, 9:36:18, App C. at 3); appellee later asked Dr. Suttleworth to comment on Dr. Kodner's testimony regarding anastomosis breakdown (VR 8/23/13; 10:22:13, App. C at 11), and Appellee asked Dr. Shuttleworth to directly comment on whether Dr. Kodner's in-court opinion was predicated on a mistaken understanding of where an anastomosis was placed. (VR 8/23/13; 11:07:33, App. C at 19). The Court of Appeals did not directly reference any of this in its opinion, but did approvingly mention that "the trial court's final assessment was that allowing

the experts to listen to each other firsthand would be both expedient or helpful to the jury." (App. A. at 4-5).

Rather than allowing the jury to determine who was more credible, Appellee allowed Dr. Shuttleworth to weigh the testimony of Dr. Kodner for the jury. The jury alone decides the weight given to an expert's testimony. Ellison v. R & B Contracting, Inc., 32 S.W. 3d 66, 76 (Ky 2000) ("Evaluation of the weight which should be given to expert testimony is the exclusive province of the jury . . ."). Furthermore, the verdict in Appellee's favor was decided by the bare minimum of nine jurors. (App. B at 3) The improper reference to Appellant's expert during the testimony of Appellee's expert may very well have had some impact on the jury's decision.

This Court has made clear that expert witnesses should stand or fall on their own, not be picked apart by indirect debate. The mischief this Court wishes to avoid is the very mischief that the Circuit Court set into motion and at least tacitly approved by the Court of Appeals. Therefore, the Court of Appeals should be reversed, the Circuit Court judgment should be reversed, and this case remanded for a new trial free from the taint of indirect debate by expert witnesses.

II. THE COURT OF APPEALS AND CIRCUIT COURT ERRED BY FINDING THAT APPELLE HAD MADE A SHOWING UNDER KRE 615(3) WHEN NO SHOWING WAS EVER MADE.

As stated above, before KRE 615(3) can be invoked, the party requesting an exemption to sequestration must first make "a *showing* that the witness is essential to furthering the party's cause." Hatfield, 250 S.W. 3d at 594 (emphasis original). The burden is clearly on the party seeking the exemption to demonstrate the requisite showing. Spears, 448 S.W. 3d at 789 (quoting Robert G. Lawson, the Kentucky Evidence Handbook, § 11.40(3) at 881 (5th Ed. 2013)).

Exempting a witness from sequestration when no showing has been made is error in and of itself. Hatfield, 250 S.W. 3d at 594.

Recognizing that Appellee must make a showing to invoke the exemption under KRE 615(3), the Circuit Court asked Appellee to offer an explanation as to why it was essential his experts remain in the Courtroom. Appellee's entire showing consisted of the statement, "Yes Sir, these experts will not be testifying as to the facts of the case, and they are essential to the management of the case." (VR 8/21/13; 12:49:48, App. C at 2) The Circuit Court felt this explanation satisfied the showing requirement (VR 8/21/13; 12:49:48, App C. at 2-3), and the Court of Appeals agreed. (App. A at 4).

The use of the word "showing" in Hatfield indicates that this Court requires more than a conclusory statement that a witness is essential. Indeed in Spears, this Court made clear that a showing requires more than "vague and general conclusions" by the proponent of the exemption; showing required for KRE 615(3) requires the proponent to identify specific contributions the witness would make by remaining or show how the witness's presence would have increased the chances of success in refuting the opposing side's theory of the case. 448 S.W 3d at 789.

The argument offered by defense counsel in Spears was that the expert "was well prepared, and could have helped the defense immeasurably by listening to the testimony of the Commonwealth's expert and lending a hand on cross-examination." Id. at 788-789. Appellee in this case offered even less than that. If the defense's explanation in Spears was insufficient, then Appellee's explanation to the Circuit Court certainly fails to demonstrate the requisite showing.

Furthermore, any "showing" under KRE 615(3) in this case was made by the Circuit Court, not Appellee. The Circuit Court, not Appellee, offered an explanation why it believed

expert witnesses should be present; namely to listen to the other expert witnesses and comment on their testimony.[5] (VR 8/21/13; 12:49:48, App. C at 2-3)

It is not the role of the Courts to flesh out the arguments for counsel. The First Circuit stated well, "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create ossature for the argument, and put flesh on its bones." United States v. Zannio, 895 F. 2d 1, 17 (1990). Likewise, Kentucky appellate courts will not construct counsel's arguments for counsel, Hadley v. Citizen Deposit Bank, 186 S.W. 3d 754, 759 (Ky. App. 2005); nor should the Circuit Court have done so for Appellee.

As Appellee offered no specific contributions that Dr. Shuttleworth would have made if granted an exemption to sequestration, nor did Appellee explain why having Dr. Shuttleworth present would refute Appellant's theory of the case. Any explanation made was done so by the Circuit Court, and as discussed in Part I.B., the explanation by the Circuit Court was rejected in Spears. Having failed to make the requisite showing that it was essential that Dr. Shuttleworth remain in the courtroom, the Circuit Court erred in allowing Appellee's expert to remain and the Circuit Court likewise erred in affirming the Circuit Court. Therefore, the Court of Appeals should be reversed, the Circuit Court judgment should be reversed, and this case remanded for a new trial.

CONCLUSION

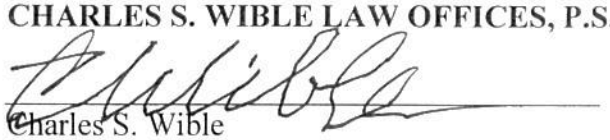
For the foregoing reasons, Appellant Kathy McAbee respectfully requests this Court to enter an Order reversing the Opinion of the Kentucky Court of Appeals and reversing the Judgment of the Circuit Court, and remand this case for a new trial.

---

[5] Even had Appellee made this argument, it would still fail under KRE 615(3) as demonstrated in Section I.B. of the Argument.

Respectfully submitted,

CHARLES S. WIBLE LAW OFFICES, P.S.C.

By: 

Charles S. Wible
324 St. Ann Street
Owensboro, KY 42303
Tele: (270) 926-3377
Fax: (270) 683-0408
Email: wiblelawoffices@bellsouth.net

ATTORNEY FOR APPELLANT